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## Termination of a minor's pregnancy: critical issues for consent and the criminal law

*The recent Supreme Court decision of State of Queensland v B has significant implications for the law that governs consent and abortions. The judgment purports to extend the ratio of Marion's case and impose a requirement of court approval for terminations of pregnancy for minors who are not Gillick competent. This article argues against the imposition of this requirement on the ground that such an approach is an unjustifiable extension of the reasoning in Marion's case. The decision, which is the first judicial consideration of the position of medical terminations, also reveals systemic problems with the criminal law in Queensland. In concluding that the traditional legal excuse for abortions will not apply to those which are performed medically, State of Queensland v B provides further support for calls to reform this area of law.*

Ben White and Lindy Willmott\*

### Introduction

Late last year, in *State of Queensland v B*,<sup>1</sup> the Supreme Court of Queensland considered an application in its *parens patriae* jurisdiction from a hospital to authorise the termination of a pregnancy of a 12 year old girl, B. Because the girl was almost 18 weeks pregnant, the proposed method of termination was through the administration of a drug, misoprostol, rather than a surgical procedure. The girl wanted the termination to go ahead as did both of her parents. This was also the course of action proposed by the hospital. Justice Wilson of the Supreme Court concluded that 'the continuation of B's pregnancy would pose serious danger to her mental health and well-being, beyond the normal dangers of pregnancy and childbirth'.<sup>2</sup> Her Honour declared that the termination of the pregnancy by the 'administration of the drug misoprostol would be reasonable in all the circumstances to avoid danger to the child's mental health'. Declarations were also made permitting the child to undergo the termination and for hospital staff to perform it.<sup>3</sup>

There were two major aspects to this decision, each of which raises significant legal issues that go well beyond the scope of the present case. The first is the issue of consent. In *State of Queensland v B*, Wilson J concluded that the girl did not have a full understanding of the nature of the proposed termination on the basis of evidence given by the girl's father, an obstetrician and a psychiatrist.<sup>4</sup> Accordingly, she was not able to give consent for herself. However, Her Honour also concluded that this consent could not be given by her parents either: such a decision to terminate a pregnancy falls outside the scope of parental authority and therefore can only be made by a court. In doing reaching this view, Wilson J extended the ratio of *Secretary*,

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<sup>1</sup> [2008] QSC 231.

<sup>2</sup> [2008] QSC 231, [12].

<sup>3</sup> [2008] QSC 231, [1].

<sup>4</sup> [2008] QSC 231, [16]. A second psychiatrist disagreed and considered that the girl was competent to make the decision: [16].

*Department of Health and Community Services (NT) v JWB and SMB*<sup>5</sup> (*Marion's case*) to decisions to terminate the pregnancy of minors who are not yet *Gillick* competent.<sup>6</sup> The implications of extending the ratio of *Marion's case* are significant and this article seeks to argue that such a position should not be adopted.

The second major aspect of the decision in *State of Queensland v B* was whether the termination was lawful. Of significance here was that Wilson J concluded that the provision of the *Criminal Code* (Qld) traditionally relied upon as an excuse for termination of pregnancies (section 282) did not apply.<sup>7</sup> That provision refers only to 'surgical operations' and so would not excuse terminations undertaken medically through the administration of drugs. With that excuse unavailable, Wilson J relied on section 286, which imposes on a 'person who has care of a child under 16 years' a duty to:

- ...
- (b) take the precautions that are reasonable in all the circumstances to avoid danger to the child's life, health or safety; and
- (c) take the action that is reasonable in all the circumstances to remove the child from any such danger
- ...

Wilson J concluded that the administration of the drug would be reasonable within the meaning of this provision and so the existence of this duty meant that the termination of pregnancy would not be unlawful.

This decision raises issues for the criminal law governing abortion. This is the first time that the position of medical terminations has been judicially considered in Queensland. The conclusion that the traditional excuse that is relied on for terminations does not apply in this context raises issues about the lawfulness of these procedures. The decision also reveals some inconsistencies in how the criminal law deals with termination of pregnancies for minors.

Although only a short judgment, *State of Queensland v B* has significant implications for two critical areas of medical law: consent and abortion. This article critically examines these two aspects of the judgment before making observations on how the problems identified should be addressed.

## **Extending *Marion's case* to terminations of pregnancy**

The authors argue that the ratio of *Marion's case* should not be extended to the termination of a pregnancy for a non-*Gillick* competent minor. To make this argument, it is necessary to recap briefly on the facts of that case, together with the reasoning of the majority, as revealed in their joint judgment, and of the three Justices who gave separate dissenting judgments.

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<sup>5</sup> (1991) 175 CLR 218.

<sup>6</sup> A child or young person has the right to make his or her own decisions as to medical treatment if he or she has 'a sufficient understanding and intelligence to enable him or her to understand fully what is proposed': *Marion's case* (1991) 175 CLR 218, 237-238. In this case, the High Court adopted the position taken in the House of Lords decision of *Gillick v West Norfolk and Wisbech Area Health Authority* [1986] AC 112, which is the source of the reference to '*Gillick* competence'.

<sup>7</sup> [2008] QSC 231, [21].

*Marion's case* involved a 14 year old girl with an intellectual disability who was severely deaf, suffered from epilepsy, had an ataxic gait and exhibited behavioural problems. Marion's parents wanted her to be sterilised and the issue was whether that decision was within the power of her parents to make. The sterilisation was 'non-therapeutic' which means that it was not needed to treat some malfunction or disease, but rather it was necessary to enhance Marion's quality of life. The parents wanted the procedures (hysterectomy and an ovariectomy) to occur to prevent 'pregnancy and menstruation with its psychological and behavioural consequences'.<sup>8</sup> The High Court held that the parents did not have power to consent to such treatment, and court authorisation was required for the procedure to be lawful.

The decision was by majority, with Mason CJ, Dawson, Toohey and Gaudron JJ delivering a joint judgment. The majority considered that the sterilisation procedure was a 'special case' requiring court authorisation for two major reasons. First, because of the 'significant risk of making the wrong decision, either as to a child's present or future capacity to consent or about what are the best interests of a child who cannot consent'.<sup>9</sup> The Justices described the three factors that they considered contributed to the significant risk of a wrong decision as follows:

1. The complexity of the question of consent – Here, the Justices referred to the fact that a person may make an incorrect assessment that the child does not have the ability to consent. They also referred to the fact that historically, incorrect assumptions were made about the inability of a child with a disability to consent to, or refuse, such a procedure.
2. The medical profession often plays a crucial role in the decision to sterilise as well as the procedure itself – The concerns of the Justices were that health professionals do not always make appropriate decisions. Further, there are many aspects of a sterilisation decision that are not of a medical nature, so are outside the expertise of the medical profession.
3. There may be conflicting factors in making a decision – The decision to sterilise involves not only the interests of the child but also possibly conflicting interests of the parents and other family members.

Secondly, the consequences of making a wrong decision are particularly grave. The consequences referred to by the majority were both the inability to reproduce, and the fact of being acted upon contrary to the child's best interests.

The other three Justices dissented, but all for different reasons. Justice Brennan was of the view that the courts could not have any wider power to consent to a medical procedure than the parents. Further, his Honour was of the view that it was beyond the power of both parents and the court to consent to a non-therapeutic sterilisation. Justice Deane took a different approach. He was of the view that a parent could consent to a sterilisation procedure, including a non-therapeutic procedure, if it were 'so obviously in the interests of the welfare of such a child'.<sup>10</sup> Court approval would only be necessary if the need for the procedure was not obvious. Finally, McHugh J was of the view that parents could consent to such a procedure if it were in the best

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<sup>8</sup> (1991) 175 CLR 218, 229.

<sup>9</sup> (1991) 175 CLR 218, 250.

<sup>10</sup> (1991) 175 CLR 218, 289.

interests of the child.<sup>11</sup> His Honour did add the caveat that the power to consent should be exercised by the court *if* the interests of the parents conflicted with those of the child.<sup>12</sup>

There are two preliminary comments that should be made about the High Court judgments which are relevant to the issue considered in this article, namely whether the ratio of *Marion's case* should be extended to the termination of a pregnancy of a non-*Gillick* competent minor. First, there were four different approaches taken by seven High Court Justices. This fact alone demonstrates the complexity and difficulty of the issues considered by the Court. Secondly, there was a clear reluctance by all members of the Court to take matters out of the ambit of parental responsibility. The majority held that it would only be in an exceptional (or 'special') case, that such a step would be taken. Justices Deane and McHugh held that, in an appropriate case, parents would have such a power, while Brennan J was of the view that courts could not have greater powers to consent to treatment than parents.

It is against this backdrop that Wilson J extended the ratio of *Marion's case* to a decision about termination of a minor's pregnancy. The authors advance three arguments as to why such an extension is not justifiable.<sup>13</sup>

### **1. Critical distinctions between the procedures of termination and non-therapeutic sterilisation**

The justification for extending *Marion's case* to decisions about terminating a pregnancy was contained in one paragraph of Wilson J's judgment. Because of the legal and practical significance of this decision, it is worth setting out that reasoning in full:

In *Marion's case*, Mason CJ, Dawson, Toohey and Gaudron JJ discussed why the parents of an intellectually disabled girl could not validly consent to her sterilisation, essentially because of the risks of their making the wrong decision and the grave consequences of their doing so. For similar reasons, B's parents should not be able to consent to the termination of her pregnancy. The Court in its role as *parens patriae* must act in the best interests of the child, B, whereas her parents may ultimately make a decision which favours other and possibly conflicting interests of the family as a whole (albeit one bifurcated by their own divorce). And, like the decision to sterilise, which was under consideration in *Marion's case*, the medical profession might be expected to play a central role in the decision to terminate the pregnancy as well as in the procedure itself. To terminate a pregnancy is to negate the possibility of the mother ultimately giving birth to a live baby [emphasis (underlining) added].

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<sup>11</sup> McHugh J considered it could be in the best interests of a child to be sterilised for non-therapeutic reasons if the procedure is necessary: to avoid serious jeopardy to the child's physical or mental health; to alleviate pain, fear or discomfort of such severity and duration or regularity that it is not reasonable to expect the child to bear it; to eliminate a real risk of the child becoming pregnant if she does not, and never will, have any real understanding of sexual relationships or pregnancy; or for an analogous purpose: (1991) 175 CLR 218, 321-322.

<sup>12</sup> (1991) 175 CLR 218, 322. His Honour noted that sterilisation and termination of a pregnancy were two situations where such a conflict of interest could potentially arise: 317.

<sup>13</sup> For a discussion of a model where the primary decision-making role rests with neither the parents nor the courts, see J Herring, 'Children's Abortion Rights' (1997) 5 *Medical Law Review* 257.

The thrust of Wilson J's reasoning is that the two factors which were relied upon by the majority in the High Court in deciding that a non-therapeutic sterilisation was a 'special case' applied equally to a termination: to use the summary of Wilson J, 'because of the risks of their making the wrong decision and the grave consequences of their doing so'. The difficulty with the Supreme Court decision is that it did not engage in any detail about how these two factors apply to the case of a termination. The authors consider there are some critical distinctions that mean terminations and non-therapeutic sterilisations should be treated differently.

#### First limb: risks of making the wrong decision

Regarding the risks of making the wrong decision, the only justification or explanation in the relevant paragraph of Wilson J's judgment was that there was potential conflict between the interests of the family and of the child, and that the medical profession would play a role in the decision-making and in the procedure itself. With respect, this comparison is too simplistic. There are many types of medical treatment that satisfies both of these conditions. The decision for a minor to be prescribed oral contraception is one example. Parents may wish this to occur because they do not want their child to become pregnant and they, the parents, do not want the responsibility of raising the child's baby. However, to be prescribed an oral contraceptive from an early age may not medically be in the child's best interest. As such, the interests of the parents may conflict with those of the minor. On the other hand, it is also possible that the parents may wish their child to take oral contraception for a legitimate medical reason, such as managing difficult and painful menstruation. In the latter situation, a conflict of interest does not arise. However, depending on the parent's motives in a particular case, there is clearly a *potential* for conflict.

Similarly, the health professional is likely to be involved in the decision-making process about whether to prescribe oral contraception. He or she would provide medical (and possibly other) opinion about treatment options, and would ultimately prescribe the medication if that were the decision taken.

It is submitted that these two factors should not be sufficient to make the prescription of oral contraception a 'special case' requiring court approval. Yet, applying the reasoning adopted in *State of Queensland v B*, that may be the result.

Importantly, in considering the risks of making the wrong decision, Wilson J did not refer at all to the risk of wrongly assessing either the child's present or future capacity to consent, or the child's best interests. It is submitted that both of these issues were extremely important to the conclusion of the High Court that a non-therapeutic sterilisation was a special case. Furthermore, these considerations demonstrate the significant difference between a non-therapeutic sterilisation and a termination. A determination of the ability of the child to consent now or in the future is a much more complex issue for a sterilisation than for a termination. In relation to the ability of the child to consent to a termination, an assessment of the child's capacity *now* is all that is relevant. Unlike a sterilisation, which could be carried out at some time in the future, there does not need to be an assessment of whether additional age or maturity will enable the child to make the decision herself in the future. Also, the factors that need to be understood in providing consent are much more straight-

forward for a termination than for a sterilisation. For the latter procedure, there are a wider number of choices of treatment and different consequences of the different sterilisation options.

In terms of the best interests of a child who cannot consent, again it is submitted that a decision about termination of pregnancy is much simpler than one about sterilisation. For a termination, the options are fewer – either it occurs or it does not (although there is generally some choice regarding how a termination is achieved). By contrast, a decision as to whether or not a non-therapeutic sterilisation is in a child's best interests involves consideration of a greater number of factors. Those factors include the extent to which alternative options have been attempted or could still be attempted. A full investigation of such matters (including any potential side-effects of alternative treatment) will generally be necessary before a court will consider approving a non-therapeutic sterilisation. The factors to consider for a sterilisation also include the various possible surgical operations available and the critical issue of the timing of any such procedure.<sup>14</sup> As a result, issues of whether to sterilise, when to sterilise and how to sterilise, make the assessment of a child's best interests more complex than for a termination of pregnancy.

In summary, the authors are of the view that the risks of making the wrong decision about a minor's ability to consent and what is in a minor's best interests are far greater for a non-therapeutic sterilisation than for a termination. It is therefore argued that the ratio of *Marion's case* should not be extended to terminations, particularly having regard to the otherwise strict approach taken to limiting parental power (see below).

### Second limb: gravity of consequences of a wrong decision

The second factor relevant to making non-therapeutic sterilisation a 'special case' for the majority of the High Court was the gravity of the consequences of making the wrong decision. The gravity of the decision for both a termination and a non-therapeutic sterilisation is obvious. However, it is submitted that the consequences of sterilisation are far graver *for the child* than the consequences of an abortion. Sterilisation means that the child can never reproduce. A termination of pregnancy means that the child will not reproduce *now*. The procedure is unlikely to affect her ability to reproduce in the future. Justice Wilson did not engage in this distinction and commented only that 'to terminate a pregnancy is to negate the possibility of the mother ultimately giving birth to a live baby'.<sup>15</sup>

## **2. A strict approach to further incursion into parental powers**

It was noted above that all members of the High Court in *Marion's case* took a strict approach to when parents will not have the power to consent to medical treatment on behalf of their child.<sup>16</sup> The dissenting three High Court Justices were reluctant to allow a court to take over traditional consent power from parents. Justices Deane and

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<sup>14</sup> In relation to the application process for approval by the Family Court of a non-therapeutic sterilisation, including the evidence that is required in support of the application, see div 4.2.3 of the *Family Court Rules 2004* (Cth). See also Practice Direction No 9 of 2004, *Victorian and Queensland Registries: Medical Procedure Applications*.

<sup>15</sup> [2008] QSC 231, [17].

<sup>16</sup> See above at 'Extending *Marion's case* to terminations of pregnancy'.

McHugh considered that, in an appropriate case, the power to consent to a non-therapeutic sterilisation should form part of parental powers, and parents should be authorised to make decisions that are in their child's best interests. Justice Brennan, although deciding that neither a court nor a parent should be able to consent to a non-therapeutic sterilisation, expressed concern about the notion that a court could have wider consent powers than a parent.<sup>17</sup> It was also clear from the lengthy and considered judgment of the majority that incursion into parental power should occur only in a 'special case'. The majority was at pains to point out what makes non-therapeutic sterilisation such a case. It should also be observed that, in no part of their judgment, did the majority suggest that the termination of a pregnancy would constitute a 'special case'.<sup>18</sup>

The limitations on parental consent powers that were imposed by the High Court in *Marion's case* have subsequently been invoked, but only on a handful of occasions. In *Re A (a child)*,<sup>19</sup> the Family Court held that gender reassignment was a 'special case' within the ambit described in *Marion's case* for which court approval was required.<sup>20</sup> The same position was taken by the Family Court some years later in *Re Alex (Hormonal Treatment for Gender Identity Dysphoria)*,<sup>21</sup> a case in which the court approved hormonal treatment being administered to a 13 year old girl who was diagnosed with gender identity disorder or gender identity dysphoria.<sup>22</sup>

As a result of two decisions of the Family Court, there is some doubt as to whether court approval is required in the case of the donation of regenerative tissue by a non-*Gillick* competent child to a sick relative. While in *GWW and CMW*,<sup>23</sup> the Family Court indicated that court approval was required, the more recent decision of *Re Inaya (Special Medical Procedure)*<sup>24</sup> held that such a procedure fell within the ordinary parental power. In the later decision, the Family Court noted the observation of the High Court in *Marion's case* that most decisions about medical treatment fell within normal parental responsibility.<sup>25</sup> Cronin J also referred to the cost and inconvenience of having to apply for court approval, factors also acknowledged by the High Court.<sup>26</sup>

It is submitted that courts should be, and have been, slow to limit the power of parents to act in their child's best interests. This sentiment permeates all of the judgments in

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<sup>17</sup> (1991) 175 CLR 218, 282.

<sup>18</sup> McHugh J acknowledged that a conflict between a child's interests and parental interests could arise in relation to a termination of pregnancy (as well as sterilisation) and if it did, then there would be no parental power to consent and court approval would be required: (1991) 175 CLR 218, 317, 322. However, these comments were made in the context of His Honour declining to mandate court approval for sterilisations and expressly recognising parental power to provide consent to all medical treatment in a child's best interests: 321-322.

<sup>19</sup> (1993) 16 Fam LR 715.

<sup>20</sup> The application in this case was for the assignment of male sex organs to the child. The court authorised the child's mother to consent to a range of medical procedures including bilateral mastectomies, hysterectomy and oophorectomy, unfolding of the clitoris, closure of the labia to create the appearance of a scrotum, the insertion of prosthetic testes and other consequential treatment.

<sup>21</sup> (2004) 180 FLR 89.

<sup>22</sup> This treatment has irreversible consequences including deepening of the voice, promotion of facial and body hair, encouragement of muscular development and the enlargement of the clitoris.

<sup>23</sup> (1997) 21 Fam LR 612.

<sup>24</sup> (2007) 38 Fam LR 546.

<sup>25</sup> (2007) 38 Fam LR 546, [60].

<sup>26</sup> (2007) 38 Fam LR 546, [61].



*Marion's case*, and is evident from the limited extension of what constitutes a 'special case' in the 17 years since the landmark decision of the High Court. A decision to terminate a pregnancy for a child who lacks capacity is a serious one, and should be made only if it accords with the child's best interests. However, when assessing the nature of the surgery, it must be questioned whether the medical procedure is comparable with non-therapeutic sterilisation, gender reassignment surgery and treatment for gender identity dysphoria. With respect to Wilson J, compelling reasons were not advanced in *State of Queensland v B* as to why a termination of pregnancy should be regarded as a 'special case' that falls outside the ordinary power of parents to consent in their child's best interests.

### 3. Parental power to consent in relation to more significant medical decisions

The decision to require court approval for the termination of pregnancy does not sit comfortably with other powers of parents to make medical decisions that are in the best interests of their child.<sup>27</sup> The decision to withhold and withdraw life-sustaining medical treatment from non-*Gillick* competent children is an obvious example. Such decisions, though tragic, are not uncommon in the case of babies who are born with very serious disabilities and for whom the provision of medical treatment is considered to be futile. The common law has recognised that these decisions to withhold or withdraw life-sustaining treatment can be made by parents without the need for court approval, even though such a decision would result in the child's death.<sup>28</sup> Court intervention is generally required only when disagreement arises between parents and the child's medical team as to what is in the child's best interests.<sup>29</sup>

A decision to withhold or withdraw life-sustaining treatment is, in some respects, similar to a decision to terminate a pregnancy: there is potential for conflict between the interests of the baby and the family (as the family may have to make sacrifices in order to raise the baby who suffers from profound disabilities); the decision to withhold or withdraw treatment will involve medical professionals; and the consequence of the decision not to provide treatment is extremely grave, namely the death of the baby. These were the factors that Wilson J relied upon in *State of Queensland v B* to justify the requirement for court approval. Yet, despite sharing these features, the courts have recognised that parents do have power to refuse consent to life-sustaining medical treatment.<sup>30</sup> It seems incongruous to require court approval for a decision to terminate a pregnancy of a child, yet not to require it for a decision that will result in the child's death.

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<sup>27</sup> The power of a parent to consent to (or refuse) treatment for their child stems from their 'parental responsibility': see ss 61C(1) and 61B *Family Law Act 1975* (Cth). Note, however, that there are legal avenues that are available to protect a child if a parent exercises his or her power in a manner that is not in the child's best interests: see further Loane Skene, *Law and Medical Practice: Rights, duties, claims and defences* (3<sup>rd</sup> ed, 2008) 4.7-4.14.

<sup>28</sup> *Wyatt v Portsmouth Hospital NHS* [2005] 1 WLR 3395, [3].

<sup>29</sup> See, for example, *Wyatt v Portsmouth Hospital NHS* [2005] 1 WLR 3395; *An NHS Trust v MB* [2006] EWHC 507 (Fam); *Re K (A Minor)* [2006] EWHC 1007 (Fam); *Re OT (A child)* [2009] EWCA Civ 409. For a general consideration of decisions in New Zealand and some other overseas jurisdictions concerning the ability of parents to refuse treatment on behalf of their non-*Gillick* competent children, see Joanna Manning in 'Parental refusal of life-prolonging medical treatment for children: a report from New Zealand' (2001) 8 *Journal of Law and Medicine* 263.

<sup>30</sup> *Wyatt v Portsmouth Hospital NHS* [2005] 1 WLR 3395, [3].

## Implications for the criminal law

*State of Queensland v B* also has significant implications for the criminal law on terminations. This article will examine the impact of this decision on surgical terminations involving children and also the law in relation to medical (rather than surgical) abortions. First, however, the law governing terminations in Queensland is outlined.

### 1. Criminal law on terminations in Queensland

In Queensland, the termination of pregnancy is governed by the *Criminal Code* (Qld). It is an offence to procure the miscarriage of a woman (section 224), including by the woman who is pregnant (section 225),<sup>31</sup> and to supply drugs or instruments to procure the abortion (section 226). Section 224 is the principal offence and provides as follows:

Any person who, with intent to procure the miscarriage of a woman, whether she is or is not with child, unlawfully administers to her or causes her to take any poison or other noxious thing, or uses any force of any kind, or uses any other means whatever, is guilty of a crime, and is liable to imprisonment for 14 years.

Despite not originally being designed to provide an excuse in relation to termination of pregnancies,<sup>32</sup> section 282 of the *Criminal Code* (Qld) is the provision principally relied upon to avoid criminal responsibility. It provides:

A person is not criminally responsible for performing in good faith and with reasonable care and skill a surgical operation upon any person for the patient's benefit, or upon an unborn child for the preservation of the mother's life, if the performance of the operation is reasonable, having regard to the patient's state at the time and to all circumstances of the case.

For the Crown to secure a conviction, it would need to negative beyond reasonable doubt one of the elements of this excuse and most relevantly for this circumstance would need to show either that:

- the termination was not performed 'for the preservation of the mother's life'; or
- the termination was not 'reasonable having regard to the patient's state at the time and to all the circumstances of the case.'

Interestingly, the interpretation of this *Code* provision has been heavily influenced by the common law. In the Victorian decision of *R v Davidson*,<sup>33</sup> the relevant offence

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<sup>31</sup> See the recent prosecution of a 19 year old woman for procuring her own abortion after importing the drug Misoprostol into Australia from the Ukraine: The Law Report, 'Queensland abortion prosecution', ABC Radio National, 28 April 2009.

<sup>32</sup> Section 282 was intended to be a defence to the offence of child destruction under section 313: RS O'Regan, 'Surgery and Criminal Responsibility under the Queensland Criminal Code' (1990) 14 *Criminal Law Journal* 73, 77. This was also noted by McGuire DCJ in *R v Bayliss and Cullen* (1986) 6 Queensland Lawyer Reports 8, 34-35.

provision considered was contravened only if the termination of pregnancy was 'unlawful'. It was therefore argued that not all terminations would be unlawful and the common law defence of necessity was identified as a source for making a termination lawful. This was captured in what became known as the 'Menhennitt ruling' (which was the name of the judge in this case) that a termination will be unlawful where it can be proved beyond reasonable doubt that the accused did not honestly believe on reasonable grounds that:

- the act was **necessary** to preserve the woman from a serious danger to her life or her physical or mental health (not being merely the normal dangers of pregnancy and childbirth) which the continuance of her pregnancy would entail; or
- in the circumstances, the act was not out of **proportion** to the danger to be averted.

Despite the different wording of section 282, it appears that the Davidson test has been accepted as the law in Queensland.<sup>34</sup> There have been a series of Supreme Court decisions that have accepted this view<sup>35</sup> and it was also the basis upon which the District Court trials in *R v Bayliss and Cullen* were held.<sup>36</sup> It is noted that the common law test as expressed in *R v Davidson* has been subsequently liberalised and it is suggested that this should also be reflected in the law of Queensland.<sup>37</sup>

## 2. Surgical terminations and children

*State of Queensland v B* involved a termination for a child who was 12 years old and not *Gillick* competent.<sup>38</sup> It is worth considering, however, the implications of this decision for children more generally in the context of surgical terminations. It is noted at this stage that medical terminations will not be considered here: they are examined below. Children can be placed into four categories for the purpose of this discussion:<sup>39</sup>

- those under 16 who are not *Gillick* competent;
- those under 16 who are *Gillick* competent;

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<sup>33</sup> [1969] VR 667.

<sup>34</sup> Compare RS O'Regan, 'Surgery and Criminal Responsibility under the Queensland Criminal Code' (1990) 14 *Criminal Law Journal* 73, 80-81. O'Regan considers that 'resort to common law principles to supplement and explain statute law ... must be regarded as very unusual in Queensland, which has a comprehensive Criminal Code, and one which does not have common law defences': 81. He considers that in Queensland it should be section 282, perhaps in combination with section 24 (honest and reasonable mistake of fact), that renders abortion lawful: 81.

<sup>35</sup> *K v T* [1983] 1 Qd R 396, 398 (affirmed on appeal in *Attorney-General (ex rel Kerr) v T* [1983] 1 Qd R 404 and *Attorney-General (Qld) (ex rel Kerr) v T* (1983) 46 ALR 275, although neither appeal court expressed a settled view on the interpretation of Queensland's abortion law); *Re Bayliss* (unreported, Supreme Court of Queensland, McPherson J, 24 May 1985); *Veivers v Connolly* [1995] 2 Qd R 326, 329.

<sup>36</sup> *R v Bayliss and Cullen* (1986) 6 Queensland Lawyer Reports 8.

<sup>37</sup> N Dixon, *Abortion Law Reform: An Overview of Current Issues*, Queensland Parliamentary Library paper, Research Brief No 2003/09 (2003). Note also the comments of de Jersey CJ in *Veivers v Connolly* [1995] 2 Qd R 326, 329, which suggest that a wider approach should also be taken in Queensland.

<sup>38</sup> For a discussion of *Gillick* competence, see above n 6.

<sup>39</sup> A child is an individual under 18: *Acts Interpretation Act 1954* (Qld). Once a child turns 18, if she lacks capacity to make a decision about terminations, that decision would then fall within the jurisdiction of the Guardianship and Administration Tribunal: *Guardianship and Administration Act 2000* (Qld) ss 65, 68, 71, 82(1)(g) and Sch 2 (definition of 'special health matter' and 'special health care').

- those over 16 who are not *Gillick* competent; and
- those over 16 who are *Gillick* competent.

Turning first to a termination for a child who is under 16 and who is not *Gillick* competent, if *State of Queensland v B* represents the law, approval of the court that the operation is in her best interests is required. Justice Wilson also held that the court would need to be satisfied that the decision was lawful because it could not be in a child's best interests to be subject to a criminal act and because the Court could not authorise what would otherwise be criminal conduct.<sup>40</sup> As noted above, in the case of *State of Queensland v B*, Wilson J relied on section 286 of the *Criminal Code* (Qld) to conclude the termination would be lawful. That provision imposes a duty on a 'person who has care of a child under 16 years' to safeguard that child from danger to her life, health or safety.

Although in that case, section 282 was not applicable because it did not involve a surgical operation (this is discussed below), in situations involving surgical terminations it may also be available to the court. If so, section 282 presents an alternative basis upon which a court could find that a termination was lawful. The result of this analysis is that consideration of whether a surgical termination may occur for a child who is under 16 and not *Gillick* competent potentially involves the consideration of three different tests:

- the child's best interests (which is the criterion for obtaining court approval);
- lawfulness under section 286 if the termination is reasonable in all the circumstances to avoid danger to the child's life, health or safety; and
- lawfulness under section 282 if the termination is necessary to preserve the child from a serious danger to her life or her physical or mental health which the continuance of her pregnancy would entail, and that the termination is not out of proportion to the danger to be averted.

A similar position arises in relation to a child under 16 who is *Gillick* competent, except that the requirement for the court to provide consent on behalf of the child in her best interests does not arise.

In relation to a child who is over 16 and *Gillick* competent, consent from the court is also not required and section 282 will be available. However, section 286 is not as its terms are limited to a duty imposed on those with the care of a child under 16. A termination for a child over 16 who is not *Gillick* competent would also be limited to section 282 (and not 286), and it would also require court consent on the basis of the child's best interests.

This analysis reveals the following anomalous situation for surgical terminations involving children as set out in Table 1.

**Table 1**

<b>Child's characteristics</b>	<b>Under 16</b>	<b>16 to 18</b>
Lacks competence	• Consent: from court in	• Consent: from court in

<sup>40</sup> [2008] QSC 231, [19].

	best interests • Lawful: section 282 or section 286	best interests • Lawful: section 282 only
Has competence	• Consent: from child • Lawful: section 282 or section 286	• Consent: from child • Lawful: section 282 only

The current state of the law is clearly problematic. This complexity presents problems not only for lawyers but also the child involved and her family as well as the doctors considering undertaking such procedures. It is also undesirable for the lawfulness of the same procedure in relation to children to be governed by different tests. For example, at least in relation to how the tests are actually worded, it is submitted that lawfulness under section 286 will be more easily met than the relevant test under section 282. Under section 286, all that is required is that the termination be reasonable to avoid danger whereas section 282 refers to a necessity to preserve the child from serious danger provided such action is proportionate.

A further anomaly in the criminal law governing terminations arises from the requirement proposed in *State of Queensland v B* that the court must sanction such a decision due to a lack of parental power. In sterilisations, a failure to get the court's consent will mean that any operation will be an assault, making those responsible liable under both criminal and civil law.<sup>41</sup> The position for terminations is different. A lack of the judicial consent required in *State of Queensland v B* will certainly lead to civil liability for the tort of assault, but it may not lead to criminal liability. If the termination occurs in circumstances in which section 282 would apply, the excuse means that a person is 'not criminally responsible'. Where this leaves the requirement of court approval so far as it is supported by effective sanctions is unclear. It certainly seems odd that a failure to obtain court approval could result in civil action but that doctors and others could at the same time be protected from criminal liability despite that failure to follow the mandated court approval process.

This situation could also arise in relation to terminations regarded as lawful through the operation of section 286. It is noted that that section is a duty provision and does not refer to a person being excused from 'criminal responsibility'. Nevertheless, that obligation to safeguard a child from danger is being relied upon in this context to excuse criminal liability and so the same anomalous situation could arise.

### 3. Medical (rather than surgical) terminations

While section 282 may have application to termination of pregnancies done by way of surgical operation, it will not apply to excuse medical terminations. The provision refers only to 'surgical operations' and would not include the taking of medication. Although the issue has been raised previously in the literature,<sup>42</sup> this was judicially considered for the first time in *State of Queensland v B* where Wilson J concluded that section 282 was not applicable because there was no surgery involved in the

<sup>41</sup> *Marion's case* (1992) 175 CLR 218, 232 (Mason CJ, Dawson, Toohey and Gaudron JJ).

<sup>42</sup> C de Costa and N de Costa, 'Medical Abortion and the Law' (2006) 29 *University of New South Wales Law Journal* 218, 220; H Douglas, 'Abortion reform: A state crime or woman's right to choose?' (2009) 33 *Criminal Law Journal* 74, 79.

termination.<sup>43</sup> What then are the implications for the lawfulness of medical terminations if this excuse does not apply? What, if anything, makes medical terminations lawful?

#### Another specific provision in the *Code*

One possibility is that there may be another provision in the *Criminal Code* (Qld) that makes medical terminations lawful in certain circumstances. This was the approach taken in *State of Queensland v B*. As noted above, Wilson J relied on section 286, which imposes a duty to safeguard a child under 16 from harm on a person who has care of that child. Justice Wilson concluded that the administration of the drug would be reasonable within the meaning of this provision and so the existence of this duty meant that the termination would not be unlawful. That provision, however, only applies to children under 16 and so would not be otherwise available. What then in those other cases?

The authors have reviewed the duty provisions of the *Code* and consider two other provisions could possibly apply: sections 285 and 290. Section 285 imposes a duty on a person to provide the ‘necessaries of life’ to another who is in his or her charge and ‘who is unable by reasons of age, sickness, unsoundness of mind, detention, or any other cause, to withdraw from such charge, and who is unable to provide himself or herself with the necessaries of life’. Section 290 imposes a duty on a person who ‘undertakes to do any act the omission to do which is or may be dangerous to human life or health’. If it could be argued that a medical termination in the particular circumstances could meet either of these criteria, a similar approach may be taken to *State of Queensland v B* and criminal responsibility excluded on the basis of a duty provision. This argument is, however, speculative as the authors are not aware of these two provisions ever being used in this way.<sup>44</sup>

#### Not ‘unlawfully’: common law defence of necessity

Another possibility is that the common law approach as first stated in *Davidson* could be applied to excuse medical terminations. Sections 224, 225 and 226 all make certain acts offences if they are done ‘unlawfully’ and it was this qualification that permitted Menhennitt J in *Davidson* to conclude that if justified by the common law defence of necessity then a termination could be lawful.

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<sup>43</sup> [2008] QSC 231, [21]. Despite this decision, it has been suggested that section 282 could be interpreted widely so that a reference to ‘surgical operation’ could include a medical termination with reliance being placed on either the ‘purposive’ or ‘always speaking’ approaches to statutory interpretation: H Douglas, ‘Abortion reform: A state crime or woman’s right to choose?’ (2009) 33 *Criminal Law Journal* 74, 81-82. However, as Douglas acknowledges, the principal obstacle to these arguments is that the relevant offence provisions already contemplate terminations through non-surgical means; for example, section 224 refers to ‘administers to her or causes her to take any poison or other noxious thing’: 82. The authors consider that in light of this, and the significant distortion of meaning that would be required for ‘surgical operation’ to include the taking of medication, that the interpretation of Wilson J in *State of Queensland v B* is likely to be accepted.

<sup>44</sup> Indeed the authors are only aware of the duty provisions being used in this way in two cases. The first was *State of Queensland v Nolan* [2002] 1 Qd R 454, where the Supreme Court authorised an operation to separate conjoined twins that would lead to the death of one of the twins. The second case is the present decision being considered: *State of Queensland v B* [2008] QSC 231.

It is suggested, however, that such an approach would not be permissible in Queensland. Because the criminal law is governed by a Code, a reference to 'unlawfully' would not permit the wholesale importation of the common law defence of necessity.<sup>45</sup> Although section 282 (dealing with surgical terminations) has been interpreted to be consistent with that common law position, that approach has been criticised.<sup>46</sup> That is also a far less significant step than incorporating a common law doctrine to operate within the *Code* but without it being attached or referable to a specific provision, as is being mooted here. As such, this argument is unlikely to be accepted.

### Not 'unlawfully': lawful prescription

An alternative argument based on the reference to 'unlawfully' has been mounted that where the Therapeutic Goods Administration 'has approved use of a drug, prescription of that drug is lawful in Queensland pursuant to the *Health (Drugs and Poisons) Regulation 1996* (Qld)'.<sup>47</sup> In other words, the lawfulness of the action derives from the legal authority to prescribe the drug granted by the Therapeutic Goods Administration and this is sufficient to displace criminal responsibility. It appears this was the position adopted by the Queensland Government after advice from the Solicitor-General.<sup>48</sup> However, this view has not been tested nor was it considered or endorsed by Wilson J in *State of Queensland v B*. Further, if this view is correct, then is there a need to meet the *Davidson* test set out above as adopted in section 282? It would appear not and this would lead to different legal tests depending on whether the termination was undertaken surgically or medically.<sup>49</sup>

## Conclusion

The decision of *State of Queensland v B* raises problems in the law of consent and the criminal law. Some of the problems stem from the judgment itself; others arise from what the decision reveals about the existing state of the law.

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<sup>45</sup> In *State of Queensland v Nolan* [2002] 1 Qd R 454, Chesterman J stated that the doctrine of necessity is 'a creature of the common law and finds only a very limited role in the Code': [17]. See also *Ward v R* [1972] WAR 36, where it was held that the *Criminal Code Act 1913* (WA) required that unless common law doctrines are expressly adopted, the Code should not be construed with an assumption that they still apply. This position was cited with approval in *Roberts v State of Western Australia* (2007) 34 WAR 1, [108]. See also RS O'Regan, 'Surgery and Criminal Responsibility under the Queensland Criminal Code' (1990) 14 *Criminal Law Journal* 73, 81 which states that Queensland does not have common law defences.

<sup>46</sup> See n 34 above.

<sup>47</sup> C de Costa and N de Costa, 'Medical Abortion and the Law' (2006) 29 *University of New South Wales Law Journal* 218, 220. See also Joint Statement by the Premier and Attorney-General of Queensland, 'Queensland Doctors and the Prescription of RU486', 24 April 2006, available at <http://statements.cabinet.qld.gov.au/MMS/StatementDisplaySingle.aspx?id=45774>.

<sup>48</sup> C de Costa and N de Costa, 'Medical Abortion and the Law' (2006) 29 *University of New South Wales Law Journal* 218, 220.

<sup>49</sup> C de Costa, M Carrette and D Russell, 'Why abortion law reform is also needed in Queensland' *Crikey Online*, 22 January 2008, available at <http://www.crikey.com.au/2008/01/22/why-abortion-law-reform-is-also-needed-in-queensland/>. For a discussion of the legal requirements of the Therapeutic Goods Administration in terms of being able to use the abortifacient mifepristone (RU486) as an 'authorised prescriber' see: C de Costa, D Russell, N de Costa, M Carrett and H McNamee, 'Early medical abortion in Cairns, Queensland June 2006 – April 2007' (2007) 187 *Medical Journal of Australia* 171.

In terms of consent, the authors have argued against the conclusion that a termination of pregnancy for a non-*Gillick* competent minor requires court approval and cannot be consented to by parents. The requirement to obtain court approval has been imposed in a very limited category of cases all of which share particular features. A closer analysis of terminations reveals that those features are not present in the same way in decisions of that type. While a termination of pregnancy is a very serious matter, the nature of the decision is not such as to deprive parents of the ability to provide consent in their child's best interests.

Accordingly, it is argued that *State of Queensland v B* should not be followed. As a decision of a single Judge of the Supreme Court, it does not bind other members of that Court. Nevertheless, individuals including parents and doctors who are considering a termination in these circumstances may be concerned as to the lawfulness of doing so without court approval. It may be prudent, unless and until the matter is reconsidered by the Supreme Court, that court approval be obtained prior to such a termination occurring.

In relation to the criminal law, the above analysis reveals that the law governing terminations in Queensland is inconsistent and uncertain. In relation to terminations for children, the different legal positions discussed above that operate depending on the characteristics of the child involved are illogical. An abortion which is legal a week before a child's 16<sup>th</sup> birthday should not then be unlawful a fortnight later when section 286 of the *Criminal Code* (Qld) is no longer available.

Nor can the ongoing uncertainty as to the lawfulness of medical terminations be justified. None of the arguments advanced above as to why medical terminations may be lawful are compelling and it is unsatisfactory that this uncertainty remains. Calls for reform of the law of abortion have been made for some time.<sup>50</sup> The problems revealed by *State of Queensland v B* and the analysis undertaken here demonstrates further the urgent need for law reform in this area.

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<sup>50</sup> See for example, L de Crespigny and J Savulescu, 'Abortion: time to clarify Australia's confusing laws' (2004) 181 *Medical Journal of Australia* 201; C de Costa and N de Costa, 'Medical Abortion and the Law' (2006) 29 *University of New South Wales Law Journal* 218; H Douglas, 'Abortion reform: A state crime or woman's right to choose?' (2009) 33 *Criminal Law Journal* 74, 86. In Queensland, see also Taskforce on Women and the Criminal Code, *Report of the Taskforce on Women and the Criminal Code* (1999), 366.